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No. 06-543

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SUPREME COURT, U.S.

In The Supreme Court of the United States

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION, ILLINOIS BELL TELEPHONE COMPANY d/b/a/ SBC ILLINOIS, VERIZON NORTH, INC. and VERIZON SOUTH, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

Respondent[1] fails to provide any convincing reason to deny the review of the question this case presents. Respondent does not dispute: 1) that Respondent failed to provide cost-based rates for local telephone service to competing payphone service providers by April 15, 1997, as repeatedly ordered by the FCC in implementing 47 U.S.C. §276; or 2) that Respondent falsely certified that it was in compliance with this federal requirement, enabling Respondent to illegally collect hundreds of millions of dollars in compensation. Various actions affecting at least 20[2] states are currently pending regarding the refund issue. Decisions affecting at least 24 states have reached irreconcilable results, with refunds for such violations being permitted in some states (18 states[3]) and denied in other states (6 states[4]).

Illinois maintains the minority position that refunds are barred by the filed rate doctrine. Respondent attempts to avoid this position's direct conflict with the subsequent decision of the Ninth Circuit, *Davel Communications, Inc. v. Qwest Corporation*, 460 F.3d 1075 (2006), by suggesting that the Ninth Circuit's opinion is limited to the application of an FCC waiver. Respondent wholly avoids the Ninth

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[1] Illinois Bell Telephone Company f/k/a SBC Illinois is the sole Respondent filing a Brief in Opposition.

[2] States involved in pending actions include Illinois, New York, Mississippi, Florida, Ohio, Michigan, Wisconsin, Massachusetts, Oregon, and the 11 western states in the *Davel* proceeding.

[3] States in which refunds are available include Michigan, Tennessee, Kentucky, South Carolina, Indiana, Louisiana, Pennsylvania, and the 11 states in *Davel*. *See* Pet. App. 197a-198a (for cases other than *Davel*).

[4] States in which refunds are not provided include Illinois, New York, Massachusetts, Mississippi, Ohio, and Florida. *See* Pet. App. 198a (listing the cases other than Ohio) and *Re Implementation of §276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, 2000 WL 973255 (Ohio P.U.C.).

Circuit's primary finding that the filed rate doctrine simply does not bar enforcement of the very regulatory scheme giving rise to the tariff-filing requirement in issue here. The Ninth Circuit found that to hold otherwise would conflict with the decisions of this Court on the general application of the filed rate doctrine. The Illinois decision, finding that the filed rate doctrine bars enforcement of that regulatory scheme, squarely conflicts with both the decision of the Ninth Circuit and the previous decisions of this Court.

The specific issue of whether refunds are available for violations of the scheme established under 47 U.S.C. §276 is an important question of federal law that has not been, but should be, settled by this Court. It is the culmination of numerous proceedings conducted over the past 11 years, many of which continue today, to first establish, and then seek compliance with, the uniform national regulatory scheme envisioned by Congress. It typically involves millions of dollars in each state that are due to small business providers of payphone services, which revenues the statute recognizes are necessary to achieve Congress' goal of the widespread deployment of payphone services. The Court should act to resolve this question and to ensure that the massive efforts to implement and enforce a uniform national regulatory scheme have not been wasted.

Finally, Respondent's suggestion that the petition for certiorari was not timely filed misstates both law and fact.

I. THE PETITION FOR CERTIORARI WAS TIMELY FILED.

While recognizing that a petition for certiorari is timely when filed within 90 days of a lower court's denial of a timely filed petition for rehearing, Respondent argues that Petitioner's motion for reconsideration did not toll the commencement of that period. Br. in Opp. 7. Respondent argues that there is a lack of authority for reconsideration of a petition for leave to appeal, causing Petitioner to file a document styled "Motion for Leave to File a Motion to

Reconsider", which was not itself a motion for reconsideration, but contemplates the filing of a further motion for reconsideration if leave is granted. Br. in Opp. 7 – 8. Respondent fails to advise this Court is that this is the procedure established by the Illinois Supreme Court under its rules for seeking reconsideration of a denial of a petition for leave to appeal. The procedure is to simultaneously file a motion for leave to file a motion for reconsideration, with the motion for reconsideration, and the supporting memorandum of law, as provided in Illinois Supreme Court Rule 361 (Ill. S. Ct. R. 361) and the decisions of the court. *Johnson v. Colley*, 111 Ill.2d 468 (1986). *Johnson* succinctly addresses the authority and the process for reconsideration of a denial of a petition for leave to appeal.

> . . . consistent with precedent, this court, on several occasions, has allowed a motion filed in accordance with Rule 361 for *leave to file a motion for reconsideration.* That procedure was followed here, and the motion for reconsideration was allowed.

Johnson, 111 Ill.2d at 472 (citations omitted, italics added).

Although the authorization for this procedure was cited in the Illinois proceeding as the basis for Petitioner's motion to reconsider, (see Pet. Reply App. 5a) Respondent failed to so advise this Court. Respondent further misleads this Court by implying that the actual motion to reconsider was not before the state court, but would be a further filing if the initial filing were granted. Br. In Opp. 7-8. Petitioner timely followed the court's established procedure for seeking reconsideration.

The court order denying the petition for leave to appeal stated that the mandate was to issue on June 15, 2006. Pet. App. 190a. On June 14, 2006, Petitioner simultaneously filed with the court the motion for leave to file a motion for reconsideration, the motion for reconsideration, and the supporting memorandum of law. Pet. Reply App. 1a, 5a, 11a. As provided under Rule 361, Respondent filed a response on

June 26th. The court twice granted Petitioner leave to file supplements to the merits of the motion for reconsideration, on July 5th and again on July 11th, with the Petitioner later submitting 20 copies of the Ninth Circuit's decision in *Davel,* as directed by the court. Pet. App. 186a – 189a. The court stayed its mandate from June 15th until it issued its order denying Petitioner's motion on July 20th (Pet. Reply App. 52a), confirming that the court suspended the finality of its previous order pending its further determination of whether it should be modified. The petition for certiorari was filed within 90 days of the July 20th order.

A timely petition for rehearing raises the question of whether the court will modify the judgment and alter the parties' rights. It operates to suspend the finality of the judgment pending the court's determination. While the court is considering whether rehearing should be granted, there is no judgment to review. *Hibbs v. Winn,* 542 U.S. 88, 97 – 98 (2004). Under Supreme Court Rule 13.1, a petition for writ of certiorari is timely if filed with the Clerk of the Court within 90 days after entry of an order denying discretionary review of the state court of last resort. Sup. Ct. R. 13.1. If a petition for rehearing is timely filed in the lower court, the time to file the petition for writ of certiorari runs from the date of the denial of rehearing. Sup. Ct. R. 13.3. Although the Illinois Supreme Court stylizes the procedure as a motion for leave to file a motion to reconsider, much like it requires a petition for leave to appeal, this is the established procedure. The only difference between *Johnson* and the instant case is that the court granted the motion in *Johnson* and denied it here.

Supreme Court Rule 13.3 does not treat an order denying a petition for rehearing different from a judgment on rehearing for the purpose of the time in which to file a petition for writ of certiorari. The petition was timely filed.

II. THIS COURT SHOULD RESOLVE THE IRRECONCILABLE CONFLICTS OVER WHETHER REFUNDS ARE AVAILABLE FOR

ESTABLISHED VIOLATIONS OF THE COST-BASED RATE REQUIREMENT OF SECTION 276 OF THE TELECOMMUNCATIONS ACT.

A. There Is an Irreconcilable Conflict Between the Ninth Circuit Decision in *Davel* and the Illinois Court's Decision.

Respondent contends that this case does not constitute a conflict with *Davel* because 1) the Ninth Circuit was only concerned with the FCC's Waiver Order[5], and 2) the Waiver Order only applied to carriers that filed new tariffs during a 45-day waiver period, which did not include Respondent. Br. in Opp. 9 – 10. Neither component withstands scrutiny.

1. The primary holding of the Ninth Circuit is that the filed-rate doctrine does not bar refunds to enforce the command of the very regulatory statute that gives rise to the tariff-filing requirement, even if the effect is to change the filed rate. *Davel*, 460 F.3d at 1085. Although the filed-rate doctrine may bar common law claims, it does not preclude claims and defenses accorded by the statute itself. *Id.*, citing *Reiter v. Cooper*, 507 U.S. 258, 266 (1993). "'Carriers must comply with the comprehensive scheme provided by the statute and regulations promulgated under it, and their failure to do so may justify departure from the filed rate.'" *Davel*, 460 F.3d at 1085 quoting *ICC v. Transcon Lines*, 513 U.S. 138, 147 (1995). The command of Section 276 and the regulations requiring rates to meet the new services test "are accorded by the regulating statute which imposed the tariff requirement and (their enforcement) are therefore not precluded by the filed-rate doctrine." *Davel*, 460 F.3d at 1085. In holding that refunds are not barred, the Ninth

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[5] Order, DA 97-805, 12 F.C.C.R. 21370 (Com. Car. Bur. Released April 15, 1997) referred to in the petition for certiorari as the Bureau Clarification Order, in *Davel* as the Waiver Order, and by Respondent as the Limited Waiver Order.

Circuit squarely conflicts with the holding of the Illinois court.

Respondent's brief only refers to the Ninth Circuit's analysis of the FCC's Waiver Order. That analysis was noted by the court as an additional "related reason" that refunds are not barred. Nothing in Respondent's argument even addresses *Davel's* primary holding, because the conflict between *Davel* and the Illinois decision is irreconcilable.

2. Respondent unsuccessfully attempts to distinguish *Davel's* holding as to the Waiver Order. Respondent argues that refunds under the FCC order would only occur if the carrier filed new tariffs during the FCC's 45 day extension of the April 15, 1997 deadline, and that Respondent failed to file any new tariffs during this time. Br. in Opp. 10. However, the carrier in *Davel* also did not file any new tariffs during this timeframe. *Davel*, 460 F.3d at 1080, 1088. Even this attempt to avoid *Davel* fails. Despite its desperate efforts to distinguish the indistinguishable, Respondent cannot avoid the conflict. Under these decisions, where the tariffed rate exceeds the cost basis required by the new services test, refunds would be available in the 11 states governed by *Davel*, while in Illinois, and some other states, refunds for the same violation of federal law are barred. This conflict is a classic reason for granting certiorari.

B. The Illinois Decision Contravenes This Court's Precedents.

Respondent argues that the Illinois court followed this Court's opinion in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932) that where a regulator, after a hearing, approves a tariffed rate, by virtue of the order that rate becomes the lawful rate. Respondent claims that since the ICC approved Respondent's tariff as reasonable under the state statute in 1995, 1) Respondent was entitled to rely upon that declaration so long as the order remained in effect, and 2) the regulator cannot change its decision retroactively. Br. in Opp. 12. But, like the Illinois court,

Respondent errs in failing to correctly apply this Court's holding under the facts of the case.

1. The ICC 1995 order was no longer in effect after the FCC expressly preempted all state regulations that did not require cost-based rates to be in effect no later than April 15, 1997.[6] As recognized by the Michigan Appellate Court[7], any tariff approved prior to April 15, 1997 that violated the new services test was preempted. Carriers were not entitled to rely on any such tariff, the existence of which did not preclude the ordering of refunds. *SBC Michigan v. Michigan Public Service Commission,* Pet. App. 180a – 181a. Although the FCC's express preemption was repeatedly emphasized in the Illinois proceedings, neither the ICC nor the Illinois court even attempted to distinguish its application. They simply ignored it.

Not only was Respondent not entitled to rely on the ICC's previous order, Respondent in fact did not rely on it. Respondent filed its own analysis of its rates on May 15, 1997 and self-certified that its rates complied with the FCC's requirement, not the ICC's 1995 order, thereby enabling Respondent to collect hundreds of millions of dollars in federal dial around compensation. The only ICC hearing conducted to determine if Respondent's tariffed rates complied with the federal requirement is the instant case, where the ICC found that they did not. This Court has consistently ruled that when a carrier makes its own determination that its rates comply with the statutory requirements, and it is later found that those rates failed to comply, reparations may be awarded. *Arizona Grocery,* 284 U.S. at 384-85, 388, 390; *Maislin Ind., U.S., Inc. v. Primary*

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[6] *In the Matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, Report and Order, 11 F.C.C.R. 20541, ¶¶ 146-147 (1996) ("*First Payphone Order*").

[7] This Section 276 refund proceeding involved Respondent SBC Illinois' sister company, SBC Michigan.